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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

MAY 14 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-88
EZ COMMUNICATIONS, INC.)	File No. BRH-910401C2
For Renewal of License of FM Radio)	
Station WBZZ(FM) on Channel 229B)	
at Pittsburgh, Pennsylvania)	
ALLEGHENY COMMUNICATIONS GROUP,)	File No. BPH-910628MC
INC.)	
For Construction Permit for)	
a New FM Broadcast Station on)	
Channel 229B at Pittsburgh,)	
Pennsylvania)	

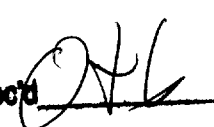
To: Honorable Edward Luton
Administrative Law Judge

OPPOSITION TO MOTION TO CERTIFY

Allegheny Communications Group, Inc. (Allegheny), by its attorneys, now opposes the "Motion to Certify" filed by EZ Communications, Inc. (EZ) on May 5, 1993.

The Hearing Designation Order, DA 93-361 (released April 5, 1993) (HDO) denied EZ's petition to deny which, inter alia, argued that Allegheny's application must be dismissed on engineering grounds. One of the arguments which the HDO rejected was that Allegheny's application violated Section 73.316(b) of the Commission's rules. The HDO found that based upon the "more accurate ERP data" contained in Allegheny's August 30, 1991 amendment, there was no violation of that rule. HDO, ¶20. In its motion to certify, EZ attempts to reargue this point. Its motion wholly fails to comply with

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the standards contained in Section 1.106(a)(2) of the Commission's rules and must be summarily denied.

For the Presiding Judge to grant EZ's motion, he must find, based on "established policy and undisputed facts" that there is substantial doubt whether a hearing should be held. Section 1.106(a)(2) of the Commission's rules. The Mass Media Bureau has already considered that question and decided that a hearing was necessary. The purpose of the rule is to limit access to the Commission "to a small number of unusual cases." Summary Decision Procedures, 34 FCC 2d 485, 24 RR 2d 1715, 1733 (1972). In this case, EZ's motion meets none of the requirements for certification. It does not demonstrate the existence of an established policy that would support Allegheny's dismissal. EZ's allegations that Allegheny's application violates the Commission's rules and contains incorrect ERP data are not "undisputed facts." EZ has not generated a substantial doubt as to the acceptability of EZ's application. Finally, EZ's motion does not raise an important policy question that would justify the very unusual step of making a certification pursuant to this rule. The motion must therefore be denied.

EZ's motion is based on the assumption that it is an undisputed fact that Allegheny's proposal violates the Commission's rules. Its claim is heavily disputed. Contrary to EZ's distorted reading of the HDO, the HDO found that there was no violation of the rule when "the more accurate ERP data"

in Allegheny's amendment was considered. As the engineering statement of Clarence M. Beverage attached to this opposition makes clear (at P. 4), EZ's arguments are "without merit or substance" and are based upon a misinterpretation of the rule. Thus, the very existence of a violation is in dispute, so EZ cannot meet the standard for certification.

EZ's consulting engineer also accuses Allegheny of using "inaccurate and inconsistent ERP data." Statement of Herman E. Hurst, Jr., Page 5. The basis for that claim is not clear, and Allegheny disputes that contention. Thus, a second dispute exists that would prevent certification.

Even if EZ's tabulation of ERP figures are treated as concededly correct - which it cannot be - EZ has failed to demonstrate the existence of an established policy that would require dismissal of Allegheny's application. Section 73.316(b)(2) of the Commission's rule states:

Directional antennas used to protect short-spaced stations pursuant to §73.215 of the rules, that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized.

EZ's thesis is that a variation of 2.00000001 dB would violate that rule because a normal rounding of such numbers would not be allowed under the Commission's rules. Mr. Beverage's statement demonstrates that the Commission's rules do not work in that manner. The Commission's rules and good engineering practice allow and require that there be a tolerance level to take into account rounding errors and conversion between

appropriate units. Beverage Statement, P. 2. Mr. Beverage's statement gives several examples where the rules and the Commission's staff rounds figures within a certain tolerance. Id. Allegheny's directional antenna pattern "is clearly within the tolerance regularly processed by the FM Branch of the Mass Media Bureau." Beverage Statement, P. 4. EZ's motion does not cite any case law or evidence to the contrary.

Finally, even if EZ had somehow demonstrated that Allegheny has violated the Commission's rules, established policy would not support the post-designation summary dismissal of Allegheny without a hearing. In Deas Communications, Inc., 7 FCC Rcd 6757, 71 RR 2d 951 (Rev. Bd. 1992), the Board reversed the summary dismissal of an applicant that admittedly violated Section 73.316(b)(2) of the Commission's rules, although the Mass Media Bureau had missed the violation in its pre-designation processing. The Board found that any violation was de minimis and that the rule did not provide clear notice that post-designation dismissal of the application could result from that de minimis violation. Any "violation" that could be found in this case would be de

possibly justify the summary dismissal of Allegheny without a hearing.

Finally, EZ's motion does not present important policy questions of general applicability that would justify immediate Commission review. Unlike the motion to certify that Allegheny has filed, EZ's motion does not present any novel or important policy questions. The Commission has already issued a large number of orders applying its hard look policy. It would be very unlikely that a Commission pronouncement in this case would have general applicability. Under these circumstances, it would be inappropriate to make this case one of the "small number of unusual cases" certified pursuant to this rule.¹

Accordingly, Allegheny asks the Presiding Judge to deny EZ's "Motion to Certify."

Respectfully submitted,

ALLEGHENY COMMUNICATIONS GROUP,
INC.

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Date: May 14, 1993

¹ Allegheny's certification request was filed pursuant to Section 1.115(e) of the Commission's rules, which uses different legal standards.

**ENGINEERING STATEMENT
IN OPPOSITION TO
MOTION TO CERTIFY
PREPARED ON BEHALF OF
ALLEGHENY COMMUNICATIONS GROUP, INC.
PITTSBURGH, PENNSYLVANIA
BPH-910628MC**

MAY 1993

**ENGINEERING STATEMENT
IN OPPOSITION TO
MOTION TO CERTIFY
PREPARED ON BEHALF OF
ALLEGHENY COMMUNICATIONS GROUP, INC.
PITTSBURGH, PENNSYLVANIA
BPH-910628MC**

MAY 1993

SUMMARY

The following engineering statement has been prepared on behalf of **Allegheny Communications Group, Inc. ("Allegheny")**, applicant for Construction Permit to build a new Class B FM Station to operate on Channel 229B at Pittsburgh, Pennsylvania as specified in FCC File No. BPH-910628MC (as amended). On May 5, 1993, EZ Communications, Inc. filed a Motion to Certify a *Section 73.316(b)* violation against **Allegheny**. This statement has been prepared in opposition to the EZ filing.

THE EZ PLEADING

The engineering statement attached to the EZ Pleading asserts the following:

1. That the Commission's 2 dB per 10 degree Rule sets forth an absolute maximum rate of attenuation for a given directional antenna with no tolerance required for rounding or units conversion.
2. That the Bureau has supported this contention.
3. That the **Allegheny** proposed directional antenna pattern does not comply with EZ's overly rigid interpretation of the Rule Section.

ALLEGHENY RESPONSE - APPLICABLE RULE AND POLICY

The statements noted above, made by EZ's engineering consultant, are statements of interpretation and opinion and not statements of fact.

First, the Mass Media Bureau did not state in the Hearing Designation Order that the 2 dB per 10 degree Rule (*Section 73.316(b)(2)*) has no tolerance. All FCC Technical Rules work within a tolerance level. This is standard good engineering practice and necessary to accommodate rounding errors and conversion between appropriate units, including ERP, in terms of kilowatts and relative field. Just a few examples of the fact that good engineering practice and the FCC Rules require tolerances may be seen as follows:

Section 73.210 Station classes: Station class is specified in this Rule Section in terms of even numbers such as 28 kW, 39 kW, etc. when, in practicality, the staff would round to the nearest 0.5 kilometer in evaluating an Application for Construction Permit.

Section 73.211 Power and antenna height requirements: Facility limits are specified in terms of dBk to the first decimal place in this Rule Section which causes the dBk power in kilowatts to exceed the actual power in kilowatts as seen below:

<u>Station Class</u>	<u>Maximum ERP Kilowatts</u>	<u>Actual ERP in dBk</u>	<u>FCC Rule dBk</u>
A	6	7.78	7.8
B1	25	13.98	14.0
B	50	16.99	17.0

Section 73.212 Administrative changes in authorization: Stations specifying an ERP in an Application for Construction Permit between 30 and 100 kW will have the ERP rounded to the nearest 1 kW. An example of the application of this rule at the staff level follows:

<u>301 APPLICATION</u>		<u>CP GRANT</u>		<u>dB Variance</u>
<u>Proposed ERP kW</u>	<u>ERP dBk</u>	<u>Granted kW</u>	<u>ERP dBk</u>	
31.51	14.98	32	15.05	0.072

It is clear by these examples, which are but a few of many cases that may be cited, that good engineering practice requires some tolerance to be allowed in calculations. The Bureau is clearly aware of this in that applications such as **Allegheny's** are processed on a regular basis without difficulty in the absence of impractical allegations such as EZ's. The most important proof to this point is the fact that the Commission recently revised its Rules for FM Directional Antennas in *Section 73.21* showings (MM Docket No. 87-121, MO&O released September 17, 1992, issue 8, paragraphs 38-40) and no specific tolerance limit was set forth.

EZ further misses the mark in understanding the underlying rationale for the 2 dB per 10 degree Rule. The Rule was implemented to codify a longstanding Commission policy concerning protection to short spaced stations:

"Despite the amendment to *Section 73.213*, eliminating this requirement, it has been a longstanding Commission policy and remains a current practice to specify on construction permits of grandfathered short-spaced stations using directional antennas that the increase in radiation off the line between the stations shall not exceed 2 dB per 10 degrees of azimuth." Emphasis added.

Footnote 16, Notice of Proposed Rule Making, MM Docket No. 87-121, released March 30, 1988.

ALLEGHENY RESPONSE - EZ NUMERICAL CLAIMS

EZ presents two tabulations which purport to show that **Allegheny** has violated *Section 73.316(b)*. Highlighted portions are listed below:

TABLE 1	
<u>Azimuth</u> <u>Span</u>	<u>EZ Calculated</u> <u>dB Change</u>
10-20°	2.000191
30-40°	2.058007
110-120°	2.015968
120-130°	2.017470

TABLE C	
<u>Azimuth</u> <u>Span</u>	<u>EZ Calculated</u> <u>dB Change</u>
10-20°	2.000192
30-40°	2.025192
50-60°	2.058008
110-120°	2.015968
120-130°	2.017470

The disparities which EZ claims are in excess of the 2 dB per 10 degree rate range from 0.0002 to 0.058008 dB (not greater than 0.058 dB) which represents a variance commonly accepted by

The foregoing was prepared by Clarence M. Beverage of *Communications Technologies, Inc.*,

Marlton, New Jersey, whose qualifications are a matter of record with the Federal

CERTIFICATE OF SERVICE

I, Susie Cruz, do hereby certify that on the 14th day of May 1993, a copy of the foregoing "Opposition to Motion to Certify" was sent first-class mail, postage prepaid to the following:

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*HAND-DELIVERED